

OGC 73-1006

5 June 1973

MEMORANDUM FOR: Acting Chief, Petroleum Branch/OER

SUBJECT: Copyright Infringement

1. Recently you requested the advice of this Office on the copyright infringement implications of World Oil, which is your annual survey of the petroleum industry. The question arises this year because of the desire to attribute the publication to the Agency. In years past, the document was published unattributed.

2. It is our understanding the World Oil has been published in two previous editions; the most recent edition consisted of 900 copies and the first World Oil consisted of 700 copies. Previous to these two editions the survey was limited to the Middle East. In August 1970, you published the last Middle East Oil Statistical Summary, which consisted of 533 copies. These publications have been distributed both within and outside the Government. A substantial number of the copies distributed outside of the Government were given to various members of the general public by our Domestic Contact Service.

3. We have reviewed the documents that you use to compile World Oil and the statutory criteria and case law dealing with copyrights (OGC 73-1005). Based on this review, it is our opinion that there are at least two, and possibly three, separate causes of action for copyright infringement in World Oil '71 (the most recent publication). It is our opinion that World Oil '71 infringes the copyrights of the Oil and Gas Journal and the 1971 Oil Statistics. While

a close question of fact, there may be an infringement of the International Petroleum Encyclopedia. In the publications previous to World Oil '71 there is only one, or possibly two, infringements (Oil and Gas Journal and International Petroleum Encyclopedia). If the most recent edition of Skinner's Oil and Petroleum International Year Book is used this year, as it has been in the past, there will be an additional cause of action for the forthcoming World Oil, because the most recent edition of Skinner's has been copyrighted. Furthermore, while a question of fact, it is our opinion that the past infringements are not excused by the fair use doctrine.

4. The Code gives the copyright owner various remedies for the infringement of his work. These remedies, which are cumulative and not alternative, are (a) injunctive relief, (b) damages the owner suffers plus profits made by the infringer or statutory damages, and (c) destruction of the infringing copies and printing plates (17 U.S.C.A. 101). The copyright owner will be able to receive injunctive relief only if the court has reason to believe the copyright infringement will continue. Whether the award is to be for actual damages inflicted or statutory damages is decided by the court from the nature of the case, particularly in those cases in which it is difficult or impossible to prove damages or discover profits. The statutory damages are such damages that to the court appear just; however, the damages shall not be less than \$250, or more than \$5,000. Moreover, for infringements involving books the Code provides a scale for the court's use which amounts to \$1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees (17 U.S.C.A. 101). Based on the data you supplied, it appears that the Agency is liable for 2,133 copies of infringing material (the three year statute of limitations has run for all earlier publications). At \$1 per infringing copy, the total statutory damages that the Agency may already be liable for range between \$3,033 and \$5,166 (depending on the number of causes of action) plus attorney's fees. Based on these facts, it is our opinion that a court would probably conclude that the damages were not "de minimus."

5. Notwithstanding the fact that the Agency may already be liable for past infringements, you are currently planning to publish a revised edition of World Oil. The fact that you did not attribute past versions to the Agency has no bearing on our liability, nor will attribution effect any future liability. The Code of Federal Regulations at 41 CFR 5-54.202 states:

It is general Government policy that copyrighted matter will not knowingly be incorporated in publications prepared by or for the Government except with the written consent of the copyright owner.

In accordance with this policy, there appear to be three courses of action that you may take to avoid future liability. Those are (1) refrain from future publication, (2) refrain from using the copyrighted materials as source materials for future publications, and (3) obtain permission from the copyright owners to use their material. We are aware that pursuing the latter raises the risk that the Agency may reveal to the copyright owners our past infringement; however, it is our opinion that this risk is less than that of continuing to incur liability as we have in the past. As none of these alternatives incur liability, we have no legal objection to any of these three courses of action.

6. Lastly, you should be aware that the OFFICIAL USE ONLY control is no longer a valid caveat under Executive Order 11652. Moreover, World Oil does not appear to meet the criteria set forth in Executive Order 11652 to be classified. If we distribute the document as in the past to the general public, we see no legal basis for denying certain segments of the public access to the publication while at the same time making it available to others; therefore, it is our opinion the publication cannot fall within the exemption provisions of the Freedom of Information Act (P. L. 90-23, as amended) STATINTL



Office of General Counsel

OGC:JED:ks

Original - Addressee

✓ 1 - OGC SUBJECT - COPYRIGHT

1 - ☐ Signer